IN THE

Supreme Court of the United States

NO. 211

W. R. KELLEY, *Petitioner*

VS.

UNION TANK AND SUPPLY COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, W. R. Kelley, respectfully prays for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the Court entered on May 7, 1948, reversing and re-

manding the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and holding that the trial court should have granted the respondent's Motion for an instructed verdict, with Mr. Justice Holmes dissenting and holding in his dissenting opinion that the matter was properly submitted to the jury, the case being numbered 12,211, "Union Tank and Supply Company, Appellant, vs. W. R. Kelley, Appellee," on the docket of the said Court.

The certified transcript of the record in this case, including the proceedings in the said Circuit Court of Appeals is presented herewith in accordance with Rule 38 of this Court.

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The majority opinion of the Fifth Circuit does not correctly present a true statement of the facts, the only correct portion of the opinion being that the plaintiff did allege himself to be an employee of one Bruce Wimberly, an independent contractor, and plaintiff did sue as an invitee of the defendant for damages for personal injuries sustained while unloading from a box car sheets of steel belonging to the defendant. The fact that the majority opinion is erroneous is well shown in the brief paragraph in which they attempted to set forth plaintiff's allegations of negligence as follows:

"The claim was that defendant was liable because defendant's contract with Wimberly called for the performance of an inherently dangerous work, unloading, in the night-time, without adequate lighting, a box car full of heavy steel sheets, which, to defendant's knowledge, but not to plaintiff's were so stacked as to be liable to fall, and defendant had failed to warn plaintiff of the grave dangers attendant on doing the work."

A much better version of the claims of negligence is set forth in the Brief For Appellant as filed in the Ciricuit Court, in which the Appellant's counsel recognized that we relied upon the following grounds of negligence:

"(a) That Joe Head, Foreman for Crawford Tank & Supply Company, discovered the dangerous and perilous condition of appellee and failed to warn appellee of his grave danger.

(b) That appellant negligently failed to furnish appellee a reasonably safe place in which to work, and negligently failed to furnish adequate lights in the box car.

(c) That the unloading of the steel in the night-time without adequate lights, when the steel, to appellant's knowledge, had been dangerously and carelessly stacked and liable to fall, was so inherently dangerous that it was the duty of the appellant to give timely warning, to furnish adequate light, and see that said steel was carefully stacked and that appellant negligently failed to perform such duties.

(d) That the appellant was negligent in that its agent, Joe Head, directed Bruce Wimberly (the independent contracter) to unload said car of steel in the night-time when Head knew at the time of giving said order that the light in the car was inadequate, and that the steel in the car was negligently stacked.

(e) That appellant discovered the perilous and dangerous position of the appellee, and then and there knew that the appellee was inexperienced, and that said Bruce Wimberly was inexperienced and incompetent to unload said steel and knew that the supports which had been attached to said sheets of steel to keep them from falling had been removed and knew that the work was being performed in the night-time without lights, and that appellee would be injured, or probably injured, and that Head, after knowledge of appellee's position of danger, failed to warn appellee of his danger and failed to warn appellee that he had removed the supports from said sheets of steel and failed to procure adequate lights, and that after Head knew of appellee's perilous position in the foregoing respects, and when there was still plenty of time for Head to act and perform the above steps and to secure adequate light, he failed to exercise any of the above precautions and negligently ordered the said Bruce Wimberly to continue unloading the sheets of steel until the car was finished.

(f) That each of the alleged acts of negligence was the proximate cause of appellee's injuries and damages."

There was no question but that the plaintiff was seriously injured to such an extent that he suffered an abcessed lung, together with the fact that his intestines were destroyed to such an extent that his bowels must forever move from an improvised opening or fistula in his stomach and that the plaintiff would permanently suffer great mental and physical pain and anguish, as well as total and permanent disability.

A portion of the testimony that is not set forth or taken into consideration by the majortiy opinion of the Fifth Circuit Court is set forth as follows:

> "The record shows that Kelley was not warned of his danger by Mr. Head. (R. Pg. 47) Furthermore, Mr. Wimberly had not warned Kelley of his danger. (R. Pg. 47) Appellee Kelley had not noticed anything unusual about the box car or the conditions in the box car. (R. Pg. 46) The plaintiff had never before unloaded any steel of this particular type and he testified that since he had been requested to move the steel by Mr. Head, who had been working in the car, that he presumed that it was safe to get in the car and take the steel out. (R. Pg. 49) Plaintiff's employer, Wimberly testified that the cause of the accident and the reason the steel fell upon Kelley was that the support which held the steel up broke. (R. Pg. 197.) Plaintiff's employer also admitted that on the former trial of the case he had testified by deposition that Head had not given Plaintiff any warning whatsoever as to his danger or any instructions as to how the work was to be performed and that in detailing the con-

versation between him and Mr. Head he made no mention of the fact that Mr. Head had given any warning to him or his men to be careful in the performance of the work contracted for (R. Pgs. 194 and 195) The appellant's representative, J. O. Head, who was in charge of the job for the appellant, testified that he, himself, had torn out supports, braces and crating and that he failed to tell Mr. Wimberly or Mr. Kelley that he had done this; that the effect of tearing the crates loose naturally weakened them more and that when he took the supports out they were easier to fall. (R. Pg. 107.) He also testified that he did not know why he didn't tell Wimberly about this but that he didn't (This latter sentence was stricken by the trial court—R. Pg. 107.) The witness, Head, also admitted on cross-examination that he knew that it was dangerous work. (R. Pg. 125.) Head also admitted upon the trial of this cause that there were ways of lighting up the box cars by lanterns or flash lights so that sufficient light would be in every part of the car and that the purpose of lighting up the car would be that it would give a man light to see how to catch hold of anything and to see the danger of anything slipping or falling. (R. Pgs. 139 and 140.) Head admitted that he knew that a man who wasn't experienced wouldn't notice the staves being set too straight up and down. The following question and answer on this part is important:

'Q Any man with ordinary eyes could see that that stuff was in a dangerous condition, as you have described it there, is that right?

A. After I tore these supports loose, crating I straightened up what had already been torn

loose from the back end, I straightened them up, took them off. When they wasn't used to unloading it would not. A man that wasn't experienced wouldn't notice it being set too straight. The staves were set too straight up and down.

Q. But you set them up there in that position?

A. Partly.' (R. Pgs. 136 and 137.)

Head admitted that he did tell plaintiff's employer, Wimberly, that he wanted the men to continue working until they finished unloading the car. (R. Pg. 105.) That when he went by around 7:00 or 7:30 P. M., that the men were unloading the car, including plaintiff; that at that time it was beginning to get dark in the car and that he noticed that they did not have any lights in the car and that he did not tell Wimberly to get any lights for the car. This was in response to the following question: 'Q. Did they, to your knowledge, or not, work during the night-time?' " (R. Pg. 106)

II.

JURISDICTION

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Sec. 347.)

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is May 7, 1948.

Petition for Rehearing filed by respondents was denied June 7, 1948.

(4) It is believed that the following cases sustain the jurisdiction of this court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. Ed. 139;

Story Parchment Co. v. Patterson Parchment Paper Co., et al, 282 U. S. 555, 75 L. Ed. 544;

Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458;

Cities Service Oil Co. v. B. P. Dunlap, et al, 308 U. S. 208, 84 L. Ed. 196;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

(5) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and said Circuit Court has decided important questions of local law in a manner in conflict with the decisions of the Texas Courts, and said Circuit Court has decided important questions of general law in a manner that is conflicting with the weight of authority; and the opinion of the Circuit Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's

power of supervision. Wherefore under Rule 38 (5) (b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

In *Galloway v. United States*, above cited, 319 U. S. 372, 87 L. Ed. 1458, the Court rendered a Writ of Certiorari in a case involving a question as to whether the evidence was sufficient to show when the plaintiff's total and permanent disability began. The majority of the Court held that the evidence was insufficient, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy dissenting.

In a very enlightening opinion, Mr. Justice Black demonstrates that the Supreme Court should grant Writs of Certiorari in cases where the right of trial by jury has been denied, this right having been one guaranteed under the Seventh Amendment to the Constitution. We cannot but quote from this most learned opinion since it demonstrates the duty of this Honorable Court to grant this Writ of Certiorari. In that case, Justice Black said in part as follows:

> "The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testified to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending

party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights, may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: 'Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights: . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of right.' So few of these cases come to this Court of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

III.

PRINCIPAL QUESTIONS INVOLVED

The majority opinion in which it is held that the trial court should have instructed a verdict for the respondent is clearly erroneous in that as said by Judge Holmes in his dissenting opinion, "The Fifth Circuit Court has decided too many questions which should have been left to the jury." According to Mr. Justice Holmes, these are the principal questions involved: We quote from Justice Holmes' opinion as follows:

> "My failure to concur in the opinion of the majority is due to the fact that too many questions have been decided therein which I think should be left to the jury upon another trial. I think the court below did not err in refusing to direct a verdict for the defendant. There are two grounds that might warrant re-submission of this case to a jury: first, whether in the absence of warning, the work at night, without adequate lighting, was inherently dangerous; second, whether the defendant interfered with the independent contractor by giving orders as to the details of carrying on the work, especially by directing that the work be continued at night until the car was unloaded. 27 Am. Jur., Sec. 31, p. 510.
>
> Because the plaintiff had worked eight hours before being injured, did not, in my opinion, excuse the original negligence, if any, of the defendant. A workman engrossed upon his task may be slower to realize his peril than if he had been forewarned. He was at least entitled to the warning in advance, so

> that he could determine for himself whether he would undertake the dangerous work. The questions of inherent danger, failure to warn, intermeddling or interference, assumption of risk, contributory negligence, and other controverted issues upon this record are peculiarly for the jury."

In our Brief to be filed in support of this petition, we will go into this matter more fully but we think, in addition to the matters suggested by Judge Holmes, that the evidence clearly raised an issue of fact as to the negligence of the respondent's representative, Head, in creating an unsafe condition which was the proximate cause of the injuries suffered by petitioner.

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The opinion of Mr. Justice Black in the Galloway case, supra, clearly demonstrates the necessity of this Honorable Court granting this writ. The dissenting opinion of Mr. Justice Holmes is clearly correct and in this case in which a man is seriously and permanently injured and in which the Fifth Circuit Court has, by its majority opinion, taken from him a $32,000.00 judgment and in which the fact findings as made by a jury which had sufficient support in the evidence, and in which the Fifth Circuit in its majority opinion has seen fit to disre-

gard said evidence, the findings of the jury should be given full force and effect by this Honorable Court by granting this writ and affirming the judgment of the United States District Court in and for the Western District of Texas, to-wit, the Honorable R. E. Thomason.

The majority opinion, if allowed to stand, will deny recovery to all employees of independent contractors who are injured by negligent third parties in cases where the performance of inherently dangerous work is involved. This is a most serious matter because the Fifth Circuit has not only incorrectly held that the rules of law pertaining to inherently dangerous work did not inure to the benefit of the servant of the contractor, but the effect of this opinion will be to deprive thousands of such employees of their legal rights in such cases. In Texas, the compensation insurance carrier has the right to intervene and to recover the amount paid by it as compensation against the negligent third party. The effect of this doctrine will be to discourage the prompt payment of compensation in cases many times where compensation is seriously needed due to the fact that the insurance carrier will be deprived of the right to the monies paid by it as compensation against the negligent third party.

In addition to this, the opinion in this case clearly conflicts with another opinion of the Fifth Circuit Court and one to which we failed to call to the attention of the Fifth Circuit Court in any Briefs heretofore filed before it,

same being the case of *Pitman et al v. Schultz*, 125 F. (2) 82. As a matter of pure coincidence, the opinion was by Judge Hutcheson and Justice Holmes was also a member of the Court participating in the decision. The case is clearly in point in support of the position assumed here by the petitioner in response to the right of the petitioner to recover because of the respondent's representative, Head, ordering them to perform the work in the night-time in an unsafe way and without adequate lighting. The opinion speaks for itself and coming from Judge Hutcheson is a complete answer to the erroneous reasoning indulged in by him in the case at bar. We quote from Judge Hutcheson's opinion as follows:

> "The suit was for damages for personal injuries. The claim was that plaintiff suffered them while, and because of, attempting to carry out an order defendant had negligently given him requiring the performance of work in an improper and dangerous way.
>
> The defenses were (1), that the work in which the plaintiff was engaged was one of construction where the work conditions were subject to constant change and the risks incident thereto were therefore assumed by him as a part of the necessary conditions under which it had to be done; and (2), that his injuries were not the result of any negligence on the part of defendant, but of his lifting a weight which upon the undisputed evidence, was not too heavy for him and if it was beyond his strength, this was a matter better known to him than to de-

fendant and the risk of which he assumed. There was a trial of the jury and a verdict for plaintiff. Defendant is here complaining of the refusal of his motion to direct a verdict and, as on the weight of evidence, of the following charge: 'If you should believe that any witness has wilfully, knowingly and corruptly sworn falsely to any material fact in the case, then you may disregard the testimony of any such witness altogether.'

(1) Appellant's first point that the injury occurred on a construction job and as the result of necessarily changing conditions of which plaintiff assumed the risk, misapprehends the nature and basis of plaintiff's claim and is without support in the record. Plaintiff's injuries were not sustained as the result of his voluntarily taking a dagerous course in the midst of changing conditions on the construction job, within City of Tupelo v. Payne, 176 Miss. 245, 168 So. 283. They resulted as they did in Norton v. Standard Oil Co., 177 Miss. 758, 171 So. 691, and in Carey Reed Company v. McDavid, 6 Cir., 120 F. 2d 843, 844, from the failure of the defendant to furnish a safe way to do the work, its positive acts in requiring plaintiff to do it in an unsafe way. For the reason that this is so, appellant's second defense that the cause of the injury was merely a voluntary overlifting by plaintiff and therefore not actionable within Harris v. Pounds, 185 Miss. 688, 187 So. 891, is equally untenable. What caused the injury here was not the voluntary act of plaintiff in overlifting. It was the awkard posture and position in which plaintiff was required by the peremptory order of his foreman to place himself in handling the load, coupled with the insufficient force with which, over

his protest he was required to do the work. The case is ruled by Natural Gas Engineering Corp. v. Bazor, Miss. 137 So. 788; Jefferson v. Denkmann Lbr. Co., 167 Miss. 246, 148 So. 237; Hardaway Contracting Co. v. Rivers, 181 Miss. 727, 180 So. 800; Montgomery Ward & Co. v. Lindsey, 6 Cir., 104 F. 2d 882; Gulf & S. I. R. Co. v. Bryant, 147 Miss. 421, 111 So. 451, 52 A. L. R. 901; Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792, 150 So. 810; Everett Hardware Co. v. Shaw, 178 Miss. 476, 172 So. 337, 173 So. 411."

WHEREFORE, your petitioner prays that a writ of certiorari issued under the seal of the Supreme Court of the United States directed to the United States Circuit Court of Appeals for the Fifth Circuit, demanding that Court to certify and send same to this Court a full and complete transcript of the record and of the proceedings of the said United States Ciricuit Court of Appeals for the Fifth Circuit had in this cause, numbered and entitled on the docket, "No. 12,211, Union Tank And Supply Company, Appellant, vs. W. R. Kelley, Appellee," that this cause may be reviewed and determined by this Court, as provided for by the Statutes of United States and that the judgment of the said Unites States Circuit

Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

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A copy of this Petition for Writ of Certiorari and Brief in Support thereof has been furnished Mr. Chas. C. Crenshaw, Sr., of Lubbock, Texas, Attorney for Respondent.

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JOHN J. WATTS

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W. R. KELLEY, *Petitioner*

VS.

UNION TANK AND SUPPLY COMPANY, *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

JURISDICTION

The grounds of jurisdiction stated in the Petition, which are printed in this Brief, will suffice, and for the sake of brevity will not be here reprinted.

II.

STATEMENT OF THE CASE

The facts pertinent of the question presented are stated in the petition and in the interest of brevity are not repeated here.

III.

SPECIFICATIONS OF ERROR

The specification of error as made in the Motion For Rehearing and filed before the Fifth Circuit Court will be the specification of error relied upon here. We will set out the entire Motion For Rehearing since the argument made in connection with specification of error is very brief and more fully amplifies and explains the erroneous action of the Fifth Circuit Court and we feel that it will amplify and shorten the work of this Honorable Court if this is done:

1.

> "That the majority opinion of the Fifth Circuit Court is in error in that it assumes that the danger herein was obvious in that this assumption ignores the testimony of Head that he had placed the staves of steel in such a position that they gave a false appearance of safety, and we do not see how it can be stated with accuracy by this Honorable Court that the situation was as well known to Kelley as it was to Head, and in this connection,

appellee respectfully submits that the following assumption of fact is erroneous when in the majority opinion the court stated on Page 6, as follows:

> "He, therefore, saw and knew everything that could have been told to him, that if the sheets were straightend up and swung over toward the north wall of the car, their weight, configuration, and size

> were such that if unsupported they would be bound to fall. There was nothing then in the work he was doing and the situation under which he was doing it which was not as fully known to him as to Head, nothing in the work that was inherently dangerous if it was done with reasonable care for the safety of the worker."

The trouble with the above statement is that no one told Kelley that the sheets had been straightened up and were standing too much on edge. Due to their grooved appearance, Kelley did not know that these supports had been removed and the sheets had been straightened back by Head so as to give a false appearance of safety. Head knew that this was dangerous to an inexperienced worker and yet failed to warn Kelley. The sheets, due to their grooved appearance, appeared to be leaning in the opposite direction from which Kelley was standing and we do not see how the Fifth Circuit Court can make such a statement as the foregoing as a matter of law.

2.

The Fifth Circuit Court erred in the majority opinion in holding as follows on Page 8 of the opinion:

> "As to the first exception, there is no evidence whatever that Head, who for defendant employed Wimberly, plaintiff's employer, in any manner interfered with the contractor in the discharge of his work. The fact that he told Wimberly that the steel must be gotten out that night was not an interfer-

ence with the contractor in the doing of the contracted work. It was merely the expression of a desire which was neither unlawful nor unreasonable. It imposed no duty whatever on the owner, to provide lighting or other means to do the work safely. This was the duty of the contractor, the failure to perform which was the negligence of the contractor, the very thing that an owner is not liable to the contractor's servants for."

We do not know how the learned author of this opinion who cited Section 414 of the Restatement of the Law of Torts as one of the supporting authorities in the *Amacker v. Skelly Oil Co.* case could have thus decided that said Section was not the law of the land. The above statement of the majority opinion is absolutely in conflict, it is most respectfully submitted, with Section 416, styled—Work Dangerous in Absence of Special Precautions.

"One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions."

We do not understand how the evidence that Head directed the contractor to continue working in the nighttime without lights can be held not to constitute an inter-

ference with the contractor's work within the meaning of 27 Am. Jur., Sec. 31, Pgs. 510-511, which Section is quoted by Mr. Justice Holmes in his dissenting opinion wherein it is said:

> "If the employer is actually present and directs the commission of a wrongful or negligent act, obviously he is liable, regardless of the relation between him and other persons."

The Fifth Circuit Court's majority opinion says that the contractor was guilty of negligence in failing to furnish adequate lighting but, under this statement from Am. Jur. as well as from the above Restatement of the Law of Torts, this does not prevent the Union Tank and Supply Company itself from being liable to the employee.

3.

The majority of the Court erred in the following statement in the majority opinion in holding as follows on Page 9 of the opinion:

"Neither is plaintiff any better situated on the breach of duty to plaintiff as invitee to exercise ordinary care to furnish him a reasonably safe place to work. The governing rule here is thus set out in 23 Tex. Jur., Sec. 21, p. 568:

"The employer is under a duty to guard the servants of the contractor against any dangerous condition known to him but not the workmen. But as against open, obvious and apparent dangers, known to the workmen, the employer or owner of the premises is under no obligation of protection. Nor may he be held responsible for an injury caused by transitory conditions incident to the progress of the work * * *"

As shown by the evidence of Kelley, note 4, supra, the injury he sustained was 'caused by transitory conditions incident to the progress of the work.' These conditions were created by him in moving the other plates and in pulling the particular piece free from its nail. The dangers arising out of these conditions, that a heavy piece of steel might in handling be caused to come off balance and fall if not supported, were open and obvious. They had been seen by, known to, and avoided by him for the eight hours that he had been working, some six of them in full daylight."

To begin with, the learned author of the opinion in the Amacker case, who is also the author of the majority opinion in this case, laid down the rule in the Amacker case that the case of *Kuptz v. Solbitt*, 88 F. (2d) 532, "does not apply to this case where the work is static and precautions against injury from it can be easily taken."

4.

The majority of the Court errs in assuming that the particular piece that fell upon Kelley fell as a result of his freeing it from the back end. This question of proximate cause or as to what causes an accident to happen is always a question for the jury where the evidence *is in conflict* and there is room for reasonable minds to differ as to whether the steel fell due to the dangerous manner in which it had been stacked by Head, or due to a support breaking as testified by Wimberly (R. 197). There is no room for saying under any of the evidence that the removal of a nail by Kelley in and of itself caused the steel to fall, since the undisputed testimony of Kelley was that the *staves were leaning the same way from the beginning of the work up until the time that the entire stack actually fell and the court has to assume conditions that were not* supported by the evidence and there is nothing in note 4, to justify this assumption. If the court refers to the testimony of Kelley that as he took out the sheets he could see that they were leaning, we would like to quote this testimony of Kelley's and call it to the attention of the court:

"Q. What did you see there concerning the stack?

A. The steel was leaning against the car, and I had no idea it could be dangerous from the way it was stacked.

The steel staves were leaning against one wall. As I had been told it had to be moved I presumed it was safe to get in and take the steel out.

Q. Had you ever unloaded any steel before?

A. Of that particular type, no, sir.

Q. You never had moved any tank staves?

A. No, sir." (Record Pgs. 48-49)

The majortiy opinion utterly ignores the following testimony of Kelley when they assume that the injury here was caused by transitory conditions incident to the work:

"Q. You saw, as you pulled these sheets out one by one, you saw that the balance in the box car there was gradually leaning, didn't you?

A. They were leaning the same degree from start to finish.

Q. Leaning the same degree from start to finish? All right. You could and did see they were leaning towards one side?

A. Towards the south, yes, sir.

Q. And you observed that condition of those things there for several hours, didn't you, as you worked along?

A. They were leaning to the south, and I judged they would be safe in that manner." (Record Pg. 68)

It is too apparent that the collapse of the entire structure was caused by the act of Head in setting the staves

of steel too much on edge, something that could not be detected by an inexperienced man such as Kelley, something that was not obvious to Kelley. This was the evidence of Head, who admits that his knowledge was superior to that of Kelley who knew of a dangerous condition existing in the box car before the appearance of safety was given same, and a man who was thoroughly experienced with and had knowledge of the danger of the work. For instance, Wimberly, the experienced contractor, saw nothing wrong with the manner in which the steel was stacked. (R. 192) For the majority, under such circumstances in the majority opinion, to assume that the injury was caused by transitory conditions as distinguished from the failure of Head to warn Kelley and as distinguished from the negligence of Head in ordering that the work be done in the nighttime, is beyond our comprehension, and we respectfully submit that the jury was entitled to consider this evidence when his conflicting testimony presents issues of fact for the jury.

In cases where materials have been negligently stacked in Texas, the danger has never been held to be open and obvious and this Honorable Court overrules such cases without a written decision as *Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082, and *City of Beaumont v. Silas*, 200 S. W. (2d) 695. If this opinion stands one can never recover in cases where materials have been negligently stacked.

5.

The Court erred in holding in its majority opinion as follows, from Page 9 of the opinion:

"Nor can plaintiff avail himself of the exception dealt with in Sec. 22, Work Inherently Dangerous. In the first place, as pointed out in *Humble Oil & Refining Co. v. Bell*, 180 S. W. (2d) at p. 975, quoting 14 R. C. L. p. 95:

> 'The rule imposing liability on the employer is for the protection of third persons, not for the protection of the contractor's servants, and the latter cannot hold the employer responsible * * * solely upon the theory that the work * * was intrinsically dangerous'."

To begin with, the Bell case, as to this portion of the opinion, has incorrectly construed the law of Texas. The Supreme Court of Texas refused the Application for Writ of Error in the Bell case for want of merit. This means, of course, under Texas law that the El Paso Court had incorrectly declared the law in many respects. Upon motion for rehearing of the Application in the Bell Case, the Supreme Court of Texas in a written opinion reported in 181 S. W. (2d) 569, and gave the reason why the Writ was refused and this Writ was entirely predicated upon the proposition that Bell was an employee of Humble and hence, could not sue at common law. Judge Alexander used this language:

> "The defendant, Humble Oil & Refining Co., was a subscriber under the workmen's compensation law and carried workmen's compensation insurance for the protection of its employees, and consequently, plaintiff's exclusive remedy against said defendant for the injury sustained in the course of his employment was under the workmen's compensation law. He could not maintain an action against said defendant for damages for personal injuries sustained by him in the course of his employment caused by the ORDINARY NEGLIGENCE OF SUCH DEFENDANT."

The above opinion shows that the Supreme Court of Texas recognized that the Humble Oil & Refining Co., was guilty of negligence toward Bell and hence, it shows that before the Humble could be guilty of ordinary negligence toward Bell, it would have to be assumed and believed that as a matter of law that a duty was owed by Humble to Bell. When all of the facts are considered, it is clear that the Supreme Court of Texas would have affirmed a recovery in the Bell case had Bell not have been a special empolyee of the Humble. The view taken by the El Paso Court is also repugnant to and in conflict with the view adopted by the authors of Texas Jurisprudence who stated as follows in 29 Tex. Jur. pg. 435, Sec. 257:

> "Independent contractors and their servants are in the position of invitees as regards the use of the general employers premises, and are third persons as regards the master's liability for injury."

The learned author of A. L. R. in Vol. 23, pg. 1133, criticizes such a doctrine as was announced in the Bell case and such a doctrine as was adopted by this Honorable Court in the majority opinion in this case. Vol. 23, pg. 1133 is as follows:

> "The broad theory has also been propounded that the doctrine which imposes upon the principal employer an enlarged liability in respect of inherently dangerous work *does not* INURE TO THE BENEFIT *of a servant of the contractor.* THE REASONING BY WHICH THIS THEORY WAS SUPPORTED IS FAR FROM SATISFACTORY. Its unsoundness seems to be conclusively indicated by the consideration that, so far as the principal employer is concerned, the servant of a contractor is a member of the public, and as such entitled to enforce his remedial rights on the same footing as other persons belonging to that category."

6.

The Fifth Circuit Court erred in its majority opinion in holding on Page 10 as follows:

> "But in the second place, and more importantly, as pointed out in Section 22, and the cases cited by it, the 'intrinsically dangerous' exception does not apply to dangers from obvious risks connected with ordinary tasks, such as construction, loading and unloading, especially where, as here, special skill was not required to avoid injury but only the exercise of ordinary care. Cases where it typically applies are cases of 'unusual perils' such as those in the cases

cited and relied on by appellee, dangerous gas and oil tanks, dangerous electric wires, etc."

The majority opinion again we respecftully submit, is in error in stating the Record. The leading case that we relied upon on inherently dangerous work was the Texas case of *Cameron Mill & Elevator Co. v. Anderson*, 87 S. W. 282, which was simply a case involving ordinary manual labor in which no special skill was required but in which they held that the ordering of the digging of a ditch in a public thoroughfare without leaving lanterns or warning signs to show the presence of the ditch was inherently dangerous upon the grounds as stated by the court through Judge Gaines:

> "* * * Ordinarily, we know that the principle of respondeat superior does not extend to cases of independent contracts, but it is not alone upon this doctrine that we predicate liability. Indeed, it may be doubted if the doctrine of respondeat superior has any application. Appellant is not the superior of McFadden in the sense that it had any control over the men or agencies employed in the work, but its liability rests upon the broad ground that IT CANNOT KNOWINGLY SET IN OPERATION CAUSES DANGEROUS TO THE PERSONS OF OTHERS WITHOUT TAKING ALL REASONABLE PRECAUTIONS TO ANTICIPATE, OBVIATE, AND PREVENT SUCH PROBABLE CONSEQUENCE, * * * (78 S. W. 8)

The majortiy opinion ignores such Texas cases relied upon by appellee such as *Continental Paper Bag Co. v.*

Bosworth, 215 S. W. Pg. 126, the facts being, briefly, that a paper bag company was under agreement to furnish space and machines with which independent contractor was to do printing, and they furnished a defective saw machine permitting hot metal to fly about, and a totally inadequate space requiring press to be placed so near saw that press feeder was in constant danger, a danger which the company had knowledge of and could have anticipated, the company was guilty of actionable negligence and was liable for injury to press feeder from metal from saw although the plaintiff was an employee of an independent contractor and though such contractor had control of both machines. The court's charge was as shown on Pg. 129 of the opinion:

> "Likewise, if an original employer or owner, pursuant to agreement with a contractor, should furnish the place and a machine or machines to be used in doing the work which the contractor is engaged to perform, and if the work done at such place and with such machine or machines, as contemplated to be done, should be so inherently dangerous or intrinsically dangerous that injury would probably be occasioned thereby to the contractor's employee or employees in the course of their service in doing such work, unless precautions were taken, then it would be the duty of the original employer or owner to such employee or employees to exercise ordinary care to take such proper precautions, although the contractor might also be under duty to them to take some necessary step or steps to avoid the danger."

The above two cases are cases in which it might be contended that the dangers were obvious but this did not prevent the application of the inherently dangerous rule and we respectfully request this Honorable Court to consider these two leading Texas cases and we respectfully insist that they utterly show that the opinion of this Honorable Court is erroneous and that the dissenting opinion of Mr. Justice Holmes is right as rain when he holds that the work, when it is to be considered that it was to be performed in the nighttime and plaintiff was in constant danger from a condition created by Head, that the work was inherently dangerous.

7.

The majority of the Court erred in holding in substance on Pg. 10 of the opinion that in the Amacker case, Amacker's relationship was not that of an invitee. It was only as an invitee that Amacker's widow could have recovered anything. There is no twilight zone in this matter. One is either a special employee or an invitee. If a special employee, recovery cannot be had under the common law and this Honorable Court has by virtue of this opinion repudiated the holding in the Amacker case.

The majority of the Court erred in holding in substance on Pg. 11 of the opinion as follows:

> 'The only danger to plaintiff arose out of the way and manner in which he did the work, a danger

which he created and which was completely obvious to him.'

We say that there is evidence in this case showing that the danger here created was first created as suggested by Mr. Justice Holmes in his dissenting opinion by the failure of Head to warn Kelley of his danger. Kelley was at least entitled to this warning in advance so that he could determine for himself whether he would undertake the dangerous work. Second, the stack fell, or at least it was an open question for the jury, under the evidence, from Head's acts in setting the staves of steel too straight up so as to give a false appearance of safety to an inexperienced man, and third, the order to do the work in the night-time was a danger created by Head and Head only and plaintiff might have avoided the injury had the lights been adequate so that he could have realized sooner that the staves were getting to be in an unsafe condition.

8.

The majority of the Court erred in holding that the duty of a master to furnish a servant a safe place in which to work was not the same duty of the owner of premises to an invitee. There are no cases supporting this Honorable Court in this statement of the law that appellee's counsel has been able to find. There is no logical basis, we respectfully suggest, supporting such a distinction and the distinction made by this Honorable Court is

clearly in conflict with the decision of the Supreme Court of Massachusetts in *Carpenter v. Sinclair Refg. Co.*, 129 N.E. 383."

IV.

STATEMENT

On Page 134 of the Record, the following questions were asked of the witness, J. O. Head:

"Q. And this 2x6 at the west end, the staves were attached through the holes in the flange by a nail, weren't they?

A. Had been.

Q. Had been?

A. Yes, sir.

Q. And that 2x6 was about, down about a foot from where the top of the staves, were they?

A. No, sir.

Q. How?

A. No, sir.

Q. Where was it?

A. Near flush with side of the stave, on the end of it.

Q. You are sure of that?

A. Yes, sir.

Q. AND YOU CRAWLED OVER THESE STAVES AND GOT UP OVER THERE AND TOOK THAT 2x6 OUT OF THE WEST END OF THE BOX CAR?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You just pulled all of those nails, you say, loose?

A. Part of them was already pulled loose.

Q. Those that were not pulled loose you pulled them loose?

A. Yes, sir.

Q. AND TOOK THAT 2x6 OUT OF THERE AND LATER TOOK IT OUT OF THE BOX CAR, IS THAT RIGHT?

A. YES, SIR."

On Page 136 of the Record, Head further testified in part, as follows:

"Q. THESE STAVES WERE NOT IN CRATES, WERE THEY, NEVER CAME IN CRATES?

A. YES, SIR, CRATING, WITH SUPPORTS OR CRATING.

Q. WHAT CRATING ARE YOU TALKING ABOUT?

A. 4x4 UP IN FRONT.

Q. HOW MANY?

A. ONE AT THE TOP OF THE STAVE AND ONE AT THE BOTTOM ON THE FLOOR AND AT THE END OF THE CAR WOULD BE A 2x6 GENERALLY."

V.

AUTHORITIES

Amacker vs. Skelly Oil Co., 132 F. (2) 431;

American Pacific Whaling Co. vs. Kristensen, 93 F. (2) 17;

American Stores Co. vs. Murray, 87 F. (2) 894;

Anderson, et al vs. Southern Ry. Co., 20 F. (2) 71;

Boal vs. Electric Storage Battery Co., (3rd Cir.) 98 F. (2) 815;

Cameron Mill & Elevator Co. vs. Anderson, 87 S.W. 282;

Carpenter vs. Sinclair Rfng. Co., 129 N.E. 383;

City of Beaumont vs. Silas, 200 S.W. (2) 695;

Crow vs. Continental Oil Co., (5 Cir.) 100 F. (2) 292;

Dallas Ry. & Terminal Co. vs. Sullivan, 108 F. (2) 581;

East Texas Theatres, Inc. vs. Swink, 177 S.W. (2) 195;

Ft. Worth & Denver City R. R. Co. vs. Hambright, 130 S.W. (2) 436;

Galveston-Houston Elec. Ry. vs. Reinle, 258 S.W. (2) 803;

Grinnell vs. Carbide & Carbon Chemicals Corp., 276 N.W. 535;

Hanson vs. Ponder, 3 S.W. (2) 426;

Harrison vs. Harrison, 100 S.W. (2) 780;

Herndon vs. Halliburton Oil Well Cementing Co., 154 S.W. (2) 163;

Holmes vs. Ginter Restaurant, 54 F. (2) 876;

Johnson vs. J. I. Case Threshing Machine Co., 102 S.W. 1089;

Kuptz vs. Sollitt & Sons Const. Co., 88 F. (2) 532;

Mary vs. Grasselli Chem. Co., 98 F. (2) 877;

McAfee vs. Travis Gas Corp., 153 S.W. (2) 442;

Memphis Cotton Oil Co. vs. Gardner, 171 S.W. 1082;

Montgomery vs. Houston Textile Mills, 45 S.W. (2) 140;

Motejl vs. Greenwood, et al., S. Ct. of Oregon, 138 Pac. Reporter (2) 216;

North American Dredging Co. vs. Pugh, 196 S.W. (2) 255;

Phillips Petroleum Co. vs. Hooper, 164 F. (2) 743;

Shuford vs. City of Dallas, 190 S.W. (2) 721;

Southern Ry. Co. et al., vs. Edwards, 44 F. (2) 526;

Sun Oil Co. vs. Kneten, 164 F. (2) 806;

Texas & Pacific Ry. Co. vs. Bursey, 192 S.W. (2) 809;

United Production Corp. vs. Chesser, 95 F. (2) 521;

Texas & Pacific Ry. Co. vs. Day, 197 S.W. (2) 332;

United Production Corp. vs. Chesser, 107 F. (2) 850;

West Texas Utilities Co. vs. Renner, 32 S.W. (2) 268

39 C. J., pp. 328 to 329, incl.;

Restatement of the Law of Torts, Vol. 2, Sec. 414, p. 1120;

Restatement of the Law of Torts, Sec. 427;

Rule 61 of the Federal Rules of Procedure.

VI.

ARGUMENT

A. *The evidence was sufficient to authorize submission of the issue of discovered peril to the Jury and to support a Jury verdict based thereon.*

The evidence of Head to the effect that at around 7:00 or 7:30 P.M., he went by and told Wimberly and Kelley to complete the work that night; that at that time it was getting dark in the car and that there were no lights to use to light up the car plus the additional evidence that Head knew that the work was dangerous and knew that

an inexperienced man would not notice that the staves were stacked too straight by him and when he knew that he had failed to warn Kelley or Wimberley or anyone else that these hidden supports had been loosened, plus the further evidence offered by Head that the effect of his act would be to make it dangerous and easy to fall upon the Plaintiff, and the further evidence of Head that if light had been there it would enable the Plaintiff to at least have a chance of escaping should the steel fall, created and raised, if it could be raised by any evidence, the issue of discovered peril. (R. Pgs. 136 and 137-139 and 140). We have to go no further in this connection than the cases cited by the Supreme Court of Texas. In the case of *East Texas Theatres, Inc., vs. Swink*, 177 S.W. (2d) 195, the Appellant relied in the Court below upon the Swink case but the Swink case is easily distinguishable from the facts in the case at bar. The Supreme Court in discussing the Swink case said, through Mr. Justice Slatton from Page 198 of the opinion: "In order to raise the issue of discovered peril a new duty on the part of the employee of the petitioner must arise whereby the perilous position of Swink must have been discovered by the employee in time for the employee to be able, by the use of the means at hand, to avert the fall. According to the evidence, the act of jumping onto the stage and the fall of Swink was one continuous act, therefore, it is evident that no time remained for the discovery of the perilous position of Swink within the time sufficient for the employee of

petitioner to avert the fall. The testimony of Swink goes no further than to raise issues of primary negligence. The gist of Fallin's testimony is that Mr. Swink had jumped and fallen into the pit before he knew that he was going to jump. How, then, can it be said, under the evidence, that Swink was in a perilous position and that the employee of petitioner discovered his perilous positon in time, by the use of the means at hand, to avert the fall and resultant injuries.

In the case at bar, the peril of Kelley was discovered at least at *7:30 P.M.* His accident did not occur until *10:30 P.M.* Head, by warning Kelley of the removal of the supports, by warning Kelley that lights should be there and by the placing of lights in said car, could have averted this accident and *by refraining from ordering Kelley to continue to work under such dangerous conditions in the night-time, an order which was given after he knew of Kelley's position of danger or probable danger, could have averted this accident.*

B. *Evidence sufficient to authorize submission of the issue of negligence in failing to furnish a safe place to work, such as an adequately lighted place.*

The first decision cited by the Appellant is the case of *Harrison vs. Harrison*, 100 S.W. (2d) 780, in support of the proposition, to use the language of Appellant's Brief, "under the decisions in Texas, the employee of an inde-

pendent contractor is merely an invitee upon the premises and the contractee does not owe him the duty of furnishing him a safe place to work." This amazing statement of the law is clearly against the great way of authority. This Honorable Court has recognized this duty to furnish a safe place in which to work in the case of *Amacker vs. Skelly Oil Company*, 132 F. (2) 431 and the cases there cited, including *United Production Corp. vs. Chesser*, 107 F. (2d) 850; *Montgomery vs. Houston Textile Mills*, 45 S.W. (2d) 140; *North American Dredging Company vs. Pugh*, 196 S.W. (2d) 255; *Crow vs. Continental Oil Company* (5 Cir.) 100 F. (2d) 292. The Crow case by this Honorable Court cites the important case by the Supreme Court of Texas, to-wit: *Galveston-Houston Electric Railway vs. Reinle*, 258 S.W. (2d) 803.

In the case of *West Texas Utilities Co. vs. Renner*, 32 S. W. (2) 268, the Court said: "But it will be noticed that this rule places upon such owner the duty, not only to warn of latent or concealed peril, but to have his premises in a reasonably safe condition. This rule was expressly approved by the Supreme Court in an opinion by Justice Greenwood in the Reinle case, supra."

Justice Hutcheson distinguishes the cases relied upon by the Appellant such as the case of *Kuptz vs. Sollitt & Sons Const. Co.*, 88 F. (2d) 532 in the Amacker case, in the following language:

"Appellant here, citing Restatement Torts Negligence 414 and 416, United Production Corp. v. Chesser, 5 Cir., 107 F. 2d 850; Montgomery v. Houston Textile Mills, Tex. Com. App., 45 S. W. 2d 140; North American Dredging Co. v. Pugh, Tex. Civ. App., 196 S. W. 255; Crow v. Continental Oil Co., 5 Cir., 100 F. 2d 292, and others of like import, insists that under the uncontradicted evidence, the duty of due care to protect deceased from the dangers of asphyxiation while working in the tank was on the defendant. Insisting too that the evidence made out a case for the jury as to whether there was a breach of that duty, and whether deceased's death was the proximate result of that breach, or was the result of natural causes or of his own contributory negligence or fault, she urges upon us that the judgment must be reversed and the cause remanded for a new trial.

Appellee, not disputing that a duty of due care may be owing to an invitee, the servant of an independent contractor coming on premises to work, insists that this case is ruled by the principle announced in Armour & Co. v. Dumas, 43 Tex. Civ. App. 36, 95 S. W. 710, 711; Kuptz v. Sollitt & Sons Construction Co., 5 Cir. 88 F. 2d 532; and like cases, that an owner is not liable for injuries caused by the changing character of the work where the very dangers to be anticipated inhere in and necessarily arise from work to be done. It also insists that, assuming a duty to warn an inexperienced worker of, and protect him from, dangers, the undisputed evidence shows that deceased was an experienced worker, that he knew the dangers and that he deliberately and with full knowledge thereof chose his own way of

doing the work, and as a matter of law, caused his own injury. It also insists that the evidence wholly fails to show death from asphyxiation.

It would serve no useful purpose to canvass and discuss the many authorities appellant and appellee cite. It is sufficient to say that the doctrine appellee invokes does not apply to this case where the work is static and precautions against injury from it can be easily taken. Cf. Montgomery v. Houston Textile Mills, supra, and Reed Co. v. McDavid, 5 Cir., 120 F. 2d 843.

The Crow case by this Honorable Court is clearly in point. In that case this Court said in substance as follows:

"We are clear in our opinion that Crow, the deceased, did not enter the premises of the Oil Company as an independent contractor. He was there as an invitee and it was the duty of this Company to exercise ordinary care to furnish him a reasonably safe place to perform the work of mending the tanks, and where a dangerous condition existed as it did, of which the Company knew or ought to have known, it should have warned Crow, or taken precautions against such dangerous condition of its premises with reference to the oil tanks. Montgomery v. Houston Textile Mills, Tex. Com. App., 45 S. W. 2d 140; El Paso Printing Co. v. Glick, Tex. Civ. App., 246 S.W. 1076."

In the case of Sun Oil Company v. Kneten by Mr. Justice Waller of this Court, the Amacker case as well as the Bell case is cited as supporting authority. The Amacker

case was a case presented to the Fifth Circuit by the author of this Brief and the Bell case was also the case of the writer's. We feel that the language of Judge Waller in the Kneten case, supra, is clearly in point in support of the issues of liability submitted to the jury in the cause at bar. In that case, Justice Waller said:

> "The owner of the premises, or the employer of an independent contractor, generally owes no duty to guard the employees of an independent contractor against the negligence of the latter. However, he is answerable for his own negligence—for his own want of due care in the circumstances. Moreover, if the negligence of an employer concurs with negligence of his independent contractor and injuries thereby result to a third person, the employer is not absolved from liability merely because he has employed an independent contractor. The employer remains liable for the non-performance of any duties arising out of the work that do not devolve upon the contractor or upon one employee. 27 Amer. Jur. 30, page 509. If the employer of the independent contractor reserves the right of supervision and control and the right to direct the manner in which the servants of the independent contractor perform their work, he is under the duty to exercise reasonable care for their safety; or if he undertakes to furnish intrumentalities with which the contractor is required to perform the work, he owes to the employees of such contractor the duty of exercising ordinary care not to furnish appliances that are known by him to be inherently dangerous. It is also the law in Texas that when the work contracted for is unusually danger-

ous in itself, as the result of circumstances brought about by the owner or employer in the first instance, and injury proximately results from such conditions, the employer is responsible to servants of the independent contractor for such injuries.

Where the work of the defendant is being carried on connectedly and concurrently with the work of the independent contractor, we think that the employer is liable as a joint wrongdoer if his own failure to exercise due care in the circumstances occurred with the negligence of the contractor in producing the injury. See Note 3, 30 A. L. R. 1508, and cases annotated thereunder.'

How can it be contended in this case that the work contracted for was not unusually dangerous as a result of circumstances brought about by the owner or the employer in the first instance. Need we go any further than to point out that *Head,* who was the appellant's representative on the job, *removed the supports* and the crates from the inside of the staves of steel *thereby making it easier* and if the testimony of Wimberly is believed, making it *possible for the tank staves to fall upon Kelley.* The appellant answers that this testimony is an irreconcilable conflict but the jury had the right to pass upon *how much of whose testimony* they were going to believe. They could believe, for instance, that Head loosened some of the supports and not all of them but that he did loosen enough of the supports to make it possible for the remaining supports to give way and thus cause the accident, accord-

ing to the manner in which Wimberly said same was caused. We have here a situation where the work of the defendant was being carried on connectedly and concurring with the work of the independent contractor and we think clearly that Judge Waller's opinion is right as rain and that the employer is liable as joint wrong-doer *since his failure to exercise due care* in the circumstances concurred with the negligence of the contractor in producing the injury.

In the Crow case the Fifth Circuit Court clearly recognized the duty of the Company to warn Kelley of his danger or to have taken precautions against the dangerous conditions existing where the Company knew, *or ought to have known*, that an injury might occur when Kelley attempted to remove the steel. We say that the Crow case is indistinguishable with the law involved here.

In this case, *the danger of the steel falling was present at the time Kelley went to work and continued during all of the time that he did work, due to an act of the appellant's employee, Head, in removing at least a portion of the supports. One could not look at the steel and see that the supports had been removed since the supports were hidden in between the staves of steel and would have had the apearance of safety to an inexperienced man such as Kelley* and hence, it was a latent present danger created by the appellants for which they are responsible under the above decisions by this Court.

The case of *Fort Worth & Denver City R. R. Co. v. Hambright*, 130 S.W. (2d) 436, cited by the appellant, is in support of the plaintiff's contention that if a dangerous condition was known to exist to Head and not to Kelley, it was the duty of Head to warn Kelley.

C. *Evidence sufficient to justify submission to the jury of the issues of negligence on the ground of Head's ordering the work done at night, knowing the light was inadequate and the steel unsafely stacked and to support a jury finding on such issue.*

The appellant argues, under its Point C from Page 44 of their Brief, as follows:

> "The mere ordering of the work to be done at night is now in and of itself negligence. In order to constitute negligence it was necessary to show and for the jury to find that Head, at the time of giving the order, knew that the lights would be inadequate, and that the steel was unsafely stacked."

If the evidence of Head that at 7:30 he told them that it was dark in the car and that they had no lights and that he then and there ordered them, with quite a lot of steel remaining to be unloaded, to finish unloading that car at night, together with his testinomy heretofore set out that an inexperienced man wouldn't notice that he had set the steel too straight after having removed the supports and made it possible for it to be easy for the

steel to fall—if this proof doesn't comply with the proof that the appellant's counsel says is necessary to make a fact issue for the jury, then we challenge the appellant's counsel to show how such proof could possibly be made. This evidence brings this case within the rule where the employer reserves *the right to determine the working conditions* under which the work is to be performed by the servants of the independent contractors.

Section 414, Page 1120, Vol. 2, Restatement of the Law of Torts, lays this rule down as follows:

> "One who entrusts work to an independent contractor but who retains control of any part of the work is subject to liability for bodily harm to others for whose safety the employer owed a duty to exercise reasonable care which is caused by his failure to exercise his control with reasonable care."

Under comment, the author proceeds as follows:

> "a. If the employer of an independent contractor retains control over the operative details of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor therein under the rules of that part of the law of agency which deals with the relationship of master and servant. The employer may, however, retain control less than that which is necessary to subject him to liability as a master. He may retain only the power to direct the order in which the work is being done, or forbid its being done in a manner likely to be dangerous to himself or others. Such a super-

visory control may not subject him to liability under the principles of agency but he may be liable under the laws stated in this section, unless he exercise his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

b. The rule stated in this section is usually, though not exclusively, *applicable when a principal contractor entrusts a part of the work to sub-contractors, but himself or through a foreman superintends the entire job.* In such a situation the principal contractor is subject to liability if he fails to prevent the sub-contractors from doing even the details of the work in a way unreasonably dangerous to others. *If he knows,* or by the exercise of reasonable care should know, that the sub-contractor's *work is being so done and has the opportunity to prevent it by exercising the power of control* which he has retained in himself so too, he is subject to liability if he knows or should know that the sub-contractors have carelessly done their work in such a way as to create a dangerous condition and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the sub-contractor to do so."

D. *Failure to warn appellee of the removal of the staves.*

The removal of the supports from the staves was not an obvious matter since the evidence showed that the crating and the supports were in between the staves which would hide the supports and would make it a hidden

and latent defect that they had been loosened in the middle and behind. Then the appellant argues in the second place that the removal of the staves, even though it created a dangerous condition, that an experienced man would have recognized the condition created. They cite a number of cases, including one Texas case, the case of *Texas & Pacific Ry. Co. v. Bursey*, 192 S.W. (2d) 809. On page 49 of appellant's Brief they set forth this rule from the Bursey case:

> "The rule seems to be that where the servant solicits employment in a particular calling, the master has the right to assume in the absence of information to the contrary, that the servant is qualified for that particular work."

The trouble with the above statement is that they did not give the rest of the sentence but saw fit to stop on a comma and an incomplete sentence, thus making the statement of the Court misleading and an incorrect statement of the law. We now give the *rest of the sentence:*

> "* * * in the duty of cautioning and instructing the servant other than as to latent or extraordinary dangers arising only from facts brought to the master's notice of the disqualification of the servant to safely encounter dangers known to him."

That rule is apparently the one invoked in this instance but we think it has no application, for the reason that it is not shown that Bursey was employed to do that particular character of work. The evidence is sufficient to

justify the conclusion that he was entirely ignorant of the dangers to which he became exposed and that this was known to the appellant. There is nothing in the evidence to indicate that he *induced* his employer to believe that he was fitted for that character of work or *know the dangers* incident to its performance. The author last referred to says:

> "The question whether the master, at the time of engaging the servant, or servants, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury."

When the above law is applied to the facts here involved, it is quite clear that Kelley should have been warned as to the latent and extraordinary danger brought about by the appellant's representative, Head, in loosening the supports. Head knew that he had not warned them of the fact and after loosening the supports and making the steel easier to fall he had attempted to straighten the staves so as to give them an appearance of safety. He further knew that to an inexperienced man that the staves would not look dangerous and of course, the evidence shows that the staves, due to the manner in which they were constructed, always lean a little toward one side or the other since the stave is curved at the top. Even an experienced man should have been warned of this danger that was created by Head.

Certainly Kelley did not solicit employment or represent that he was experienced and at the most this was an incidental question for the jury and we feel that the appellant should not quote part of the case here involved and thus make the statement of law which is laid down in the case appear incorrect.

To begin with, different rules apply as to the relationship of master and servant and that of invitor and invitee. That difference is not with reference to the duty to furnish a reasonably safe place in which to work, for instance, see the case by the Supreme Court of Massachusetts, *Carpenter vs. Sinclair Refining Company*, 129 N.E. 383, wherein the Court said:

> "At the time of the accident, the Plaintiff was the employee of an independent contractor. He was on the defendant's premises by the defendant's invitation, and under these circumstances *it owed him the same duty that it owed to one of its own employees.* That duty was to warn him of dangers incident to his work which he did not know of or apprehend and could not reasonably have discovered, and which dangers the defendant knew or should have known. *The defendant could not delegate this duty to warn the plaintiff respecting obscure and concealed dangers.*"

The distinction exists in that it is the duty of the employer of the independent contractor to be aware of danger existing in the transaction of the business contracted for.

In this connection, see *Boal v. Electric Storage Battery Company* (3d Cir.) 98 F. (2d) 815; *Mary v. Grasselli Chemical Company*, 98 F. (2d) 877, in which the Court said:

> "It makes no difference whether or not the defendant was actually aware of the danger for it is 'charged with the knowledge of * * * the nature of the constituents and general characteristics of the substance used in his business, so that he can give directions for the conduct thereof with ordinary safety to his servants performing the work with ordinary care."

The argument is made that where an owner of property calls upon a trucking contractor to transport freight or other materials he has the right to assume that the men furnished by the contractor are competent and experienced. The above statement is not tenable as shown by the above Bursey case and is not tenable with the announcements of these cases above discussed since in this case the owner of the property did not call upon a trucking contractor to simply transport freight but invited them to premises under their control and the premises which they had, by their own acts, to-wit, the acts of Head in removing the supports, created a highly latent and dangerous condition.

In the Reinle case, 258 S.W. 803, the Supreme Court of Texas expressly held that an employee of an independent contractor upon the premises is an invitee of the owner and that the owner or occupant of the premises *owes a duty to such employee of the independent contractor to*

maintain the premises in a reasonably safe condition. The owner of the premises was held liable to the employee of the independent contractor for injuries sustained by reason of an unsafe condition of the premises, even though the independent contractor was also negligent in failing to warn his employee of the condition. The holding of the court was in part as follows:

> "* * * The contract involved an invitation by the interurban company (occupant of the premises) to the (independent) contractor's employees to labor within the danger zone. * * * The facts, therefore, bring the case within the rule that one cannot, for his own advantage, invite others to come on, or to remain about, premises in his possession and under his control, without using proper care to give warning of a grave danger to be probably there encountered of which the invitees may have no knowledge.

Judge Cooley, for the Supreme Court of Michigan, said:

> " 'Every man who expressly or by implication invites others to come upon his premises, *assumes to all who accept the invitation* the duty to warn them of any danger in coming which he knows or ought to know of, and of which they are not aware.' Samuelson v. Cleveland Iron Mining Co., 49 Mich. 170, 13 N. W. 501, 43 Am. Rep. 456.

Judge Strong, for the Texas Commission of Appeals stated the general rule to be:

> " 'The owner or occupant of real property is under no obligation to make it safe for the benefit of

trespassers, intruders, or mere licensees coming upon it without his invitation, expressed or implied. If, however, such owner or occupant invites the public or particular members of it to come upon his premises, he owes to such persons the duty to have same in a reasonably safe condition and to give warning of latent or concealed perils.' Bustillos v. Southwestern Portland Cement Co., 211 S. W. 929.

"* * * *

"The Court answers that it was the DUTY of the interurban company to exercise ordinary care to give Reinle (employee of the independent contractor) notice or warning of the danger of the boom coming in contact with, or in close proximity to, the uninsulated high-voltage wires, notwithstanding Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger."

It is therefore seen that under the law of this state an owner or occupant of premises owes a duty to employees of an independent contractor on the premises, to keep the premises in a reasonably safe condition or to warn of latent dangers. Considering the question merely from the standpoint of practical justice, why should an employee of an independent contractor be barred from recovery against the owner, when other invitees would be allowed to recover against the owner? If a duty is owed to a child attracted upon the premises by a dangerous instrumentality, why is not a duty owed to a person who

is on the premises to do work for the ultimate benefit of the owner? Or, if a duty is owed by the owner to a member of the public who is injured by falling into an unguarded pit near a public way, why is not a duty owed by the owner to an invitee who is injured by a negligent condition on the premises? FORESEEABILITY OF INJURY is the test as to whether an owner or occupant owes a duty to a person. Surely it must be held that it is reasonably foreseeable that an employee of an independent contractor would likely be injured if the premises were negligently allowed to remain in an unsafe condition.

E. *The evidence was sufficient to support a finding by the jury that the work was inherently dangerous.*

We shall undertake to show what the well established law in Texas is with reference to what is meant by the term "inherently dangerous work." The leading case in Texas on inherently dangerous work is the case of *Cameron Mill & Elevator Co. v. Anderson*, 87 S.W. 282. According to that case the owner or occupant of the premises is deemed to be negligent, if the independent contractor is negligent, under these circumstances, because the duty to exercise the highest degree of care where intrinsically dangerous work is involved is a duty which the owner cannot delegate, and cannot shift to the independent contractor so as to free himself of liability. Judge Speer, in the opinion of the Court of Civil Appeals in the Mill &

Elevator case which was expressly approved by the Supreme Court through Judge Gaines, stated the basis for the rule as follows:

> "* * * Ordinarily, we know that the principle of respondeat superior does not extend to cases of independent contracts, but it is not alone upon this doctrine that we predicate liability. Indeed, it may be doubted if the doctrine of respondeat superior has any application. Appellant is not the superior of McFadden in the sense that it had any control over the men or agencies employed in the work, but its liability rests upon the broad ground that it cannot knowingly set in operation causes dangerous to the persons of others without taking all reasonable precautions to anticipate, obviate, and prevent such probable consequence; * * *" (78 S. W. 8)

> 27 Am. Jur., page 515, 516, after defining inherently dangerous work states: "This rule is sufficiently comprehensive to embrace, not only work, which, from its demonstration, is inherently or 'intrinsically dangerous,' but also work which will in the ordinary course of events, occasion injury to others if certain precautions are omitted, but which may, as a general rule, be executed with safety if those precautions are adopted."

The case of *North American Dredging Company v. Pugh*, 196 S.W. 255, states the rule in Texas:

> "For liability to attach to the employer of an independent contractor, it is not required that it be absolutely neccessary that injuries to third persons will result from the doing of the work, but if the

work is so inherently or intrinsically dangerous that injuries will probably be occasioned to third persons unless proper precautions are taken, the employer may be liable for such injuries, though primarily they are caused by the negligence of the contractor in failing to take the necessary steps to avoid the danger."

We know of no better method of setting forth the well-established law relative to the inherent danger rule than quoting from 39 C. J., pages 1328 to 1329, inclusive:

"Sec. 1540 f. WORK DANGEROUS UNLESS PRECAUTIONS OBSERVED.—

(1) IN GENERAL. A very important exception to the general rule exempting the contractee from liability for injuries caused by the negligence of an independent contractor or his servants is that, where the work is dangerous of itself, or as often termed in 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employing an independent contractor to do it. Stated in another way, where injuries to third persons must be expected to arise unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it is the contractor employed to do the work from which the danger arises, or, some independent person to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. The taking of these precautions, it is said, is a nondelegable duty owing to third persons who may sustain injuries from the

work, and the contractor is considered an agent or servant for whose act his employer is responsible. The injury need not be a necessary result of the work, but it is sufficient that it will be a probable result of the work if proper precautions to guard against injury are not taken. However, the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken. If the work is of such a nature that it could be done without probable injury to any one except in the event of negligence in the manner of doing it, no liability attaches to the employer.

THIS EXCEPTION IS BASED upon the usual danger to third persons which inheres in the mere performance of the work itself aside from any negligence on the part of the contractor, or his servants, and the reason for the imposition of liability is the duty of due consideration which one in a civilized community owes to his fellows and to the public, which duty precluded the ordering of that which if done will be inherently dangerous.

(Sec. 1541) (2) WORK DANGEROUS TO INVITEES OF CONTRACTOR. An application of this exception to the generel rule of non-liability is found in decisions holding that, when the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons.

(Sec. 1542) (3) WHAT WORK IS INHERENTLY DANGEROUS.—

(a) IN GENERAL. Whether work of a given character is to be regarded as 'necessarily' or 'inherently,' or 'intrinsically' dangerous, or its performance 'attended with danger to others' within the meaning of such terms when used in this connection, is often a matter as to which different opinions may be entertained. However, in determining in any given case whether any particular work is inherently dangerous, the proper test, it is said, is whether danger inheres in the performance of the work. The test as to 'inherently dangerous' work is not whether a man of ordinary prudence would have anticipated that the injury would have ensued therefrom, nor can mere liability to injury from doing the work be the test, since injuries may happen in any undertaking and many are attended with great danger if carelessly managed, although with proper care they are not specially hazardous."

These principles of law are supported by many, many cases, one of the leading cases by the Federal Courts being the case of *American Pacific Whaling Co. v. Kristensen*, 93 Fed. (2d) 17, in which the Court said:

> "If work done by an independent contractor has in it an inherent element of danger, and through negligence of the contractor proper provision has not been taken to guard against such danger, such negligence is imputed to the employer."

The Court further said:

"If the work from its nature is likely to cause danger to others, there is a duty on the employer to take all reasonable precautions against such danger, and employer does not escape liability for the discharge of that duty by employing an independent contractor, if the latter does not take proper precautions."

Section 427 of the Restatement of the Law of Torts, together with the comment thereon under Section "a" explains this situation so as to show the right of the appellant to recover:

"Section 427. Negligence in Doing Inherently Dangerous work. One who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work.

"Comment: (a) Meaning of 'Inherently Dangerous.' The words 'inherently dangerous work' are used to indicate not only that the nature of the work itself, or of the instrumentalities which must necessarily be used in doing it, is such that it can only be safely performed by exercise of a special skill and care as distinguished from work which can be safely done if performed with ordinary skill and care is dangerous irrespective of whether special skill or care is used, but also that the work if unskillfully and carelessly done, involves a great risk of serious bodily harm or death.

"The usual situations in which the liability stated in this section is imposed are those in whch the work

in hand involves the use of instrumentalities, SUCH AS FIRE OR HIGH EXPLOSIVES, which require constant attention and skillful management in order that they may not be injurious to others, or those in which the work itself, *like the demolition of a high chimney*, is incapable of being safely done unless the persons who do it are highly skilled and act with the utmost attention and care. The liability stated in this section extends only to harm which is caused by the failure so to act as to minimize to the uttermost the danger inherent in the nature of the work or in the instrumentalities used. It does not extend to harm caused by negligence in a particular detail of the work which in itself is not inherently dangerous. Thus, one who employs a contractor to do blasting close to a public highway or to the land of another is liable under this Section if the blasting is carelessly done, *or the explosives carelessly handled by the contractor or his servant.*"

It is to be observed that the definition complained of in this case was taken from the Restatement of the Law of Torts and was so given in the court's charge verbatim.

For examples of work held to be inherently dangerous, see the cases of *Johnson v. J. I. Case Threshing Machine Company*, 182 S.W. 1089; *Grinnell v. Carbide and Carbon Chemicals Corp.*, 276 N.W. 535, and the many cases there cited. Surely, if the digging of the ditch in a street is inherently dangerous work as was held by the Supreme Court of Texas in the Cameron case, then how can it be contended that requiring men to work around heavy staves of steel in the nighttime when those staves of steel have

had their supports weakened by the appellant without warning to the appellee is not inherently dangerous work? No better rule as to what constitutes inherently dangerous work can be found than that referred to by Judge Hutcheson's case and cited in the foot note.

The unloading of the steel under ordinary circumstances might not have been inherently dangerous but when the appellant determined that the work should be done in the nighttime without lights and when the appellant, by his own acts, created a hidden trap and highly dangerous situation by loosening the supports, *then work that ordinarily would probably be considered not inherently dangerous becomes inherently dangerous and of this we think there is no doubt.*

F. *The undisputed evidence shows that the appellee did not assume the risks and was not guilty of contributory negligence as a matter of law and at the most, a question of whose negligence was a proximate cause of the event, was a matter for the jury.*

The first case relied upon by the appellant in its Brief before the 5th Circuit is the case *United Production Corp. v. Chesser* in which they cite the opinion in 95 F. (2d) 521 on the last trial of the Chesser case. This Honorable Court in 107 F. (2d) 850, the opinion being by Mr. Justice McCord, affirmed the judgment for the plaintiff and

we think the opinion is important upon the question of contributory negligence in this case for the appellee, as shown by the opinion, in which this Court said in part as follows:

> "Thornhill went upon the premises as a business invitee of the appellant for the purpose of performing work in conjunction with the employees of the appellant United Production Corporation. He had, therefore, the right to assume that the employees of the invitor were performing their duties in a workmanlike, careful manner, and it was not incumbent upon him to make any inspection of their work to ascertain whether or not they were performing it properly. Texas Pacific Coal & Oil Co. v. Grabner, Tex. Civ. App., 10 S. W. 2d 441, 444.
>
> We find no evidence that the deceased failed to exercise ordinary care in his work, and in the absence of evidence to the contrary there is a presumption that Thornhill was conducting himself with prudence and was exercising ordinary care. Missouri, K. & T. v. Luten, Tex. Com. App. 228 S. W. 159; Jordan v. City of Lubbock, Tex. Civ. App. 88 S. W. 2d 560; Texas & P. Ry. Co. v. Wylie, Tex. Civ App., 36 S. W. 2d 238; Contributory negligence cannot be presumed and there is nothing in the record to compel a finding by the jury that Thornhill was guilty of contributory negligence. The issue was properly submitted to the jury. Houston & T. C. Ry. Co. v. Pollock, Tex. Civ. App., 115 S. W. 843; Id., 103 Tex. 69, 123 S. W. 408; Rio Grande El Paso & S. F. Ry. Co. v. Lucero, Tex. Civ. App., 54 S. W. 2d 877; Jordan v. City of Lubbock, Tex. Civ. App., 88 S. W. 2d 560."

In this case the evidence shows that Kelley testified that he believed or presumed that it was safe to remove the steel or else he would not have been requested to do so by the appellant's representative, Head. The Chesser case is the authority for the fact that Kelley had the right to make this assumption since he knew that Head had been working in the car which he had been asked to finish unloading and he would not have to make any inspection to see whether or not Head had maintained the necessary safeguards so that the car load of steel could be safely unloaded. The cases cited by the appellant upon which they rely to sustain this point of contributory negligence as a matter of law, in addition to the Chesser case are *Southern Railway Company, et al v. Edwards*, 44 F. (2d) 526, and *Anderson, et al v. Southern Railway Co.*, 20 F. (2d) 71. The case of *Hanson v. Ponder*, 3 S.W. (2d) 426, by the Commission of Appeals of Texas, distinguishes this case from the Anderson case in the following language:

> "In the original opinion we did not particularly notice the contention that Hanson was guilty of contributory negligence as a matter of law in respect to which, it is said, there was requisite proximity of causation. That question is represented with the addition of Anderson v. Southern Ry. Co. (C. C. A.) 20 F. (2d) 71, as authority, and we will discuss it briefly.
>
> In general, it may be said that the proof which made issuable negligence as charged to the carriers would include indication of an issuable nature, also,

for Hanson's asserted negligence. In addition, there is evidence of his being directed in a general way by his superiors to go upon the car and load and do what he did do, that some of the acts done immediately before the load began to roll were done by other workers, and that, as a fact, he was not cognizant of any particular danger.

Anderson v. Southern Ry. Co. is readily distinguishable on the facts. It was "admitted" there that the load, etc., was made to conform to rules of the "American Railway Association," and here that point is issuable (as shown in the original opinion); there, all of the wires were cut under positive directions of the man who was killed while he was on top of the "load"—that command being given by him despite warning of danger then expressly given him by the man who was ordered to cut the wires and to which he responded (in effect) that would take the chances—while no comparable hypothesis exists (at least, is not conclusively established) in the evidence here. The fact conditions, which existed there (as shown by admissions of "uncontradicted" evidence), and which, as noted, do not exist here, exerted great force (as is apparent in the opinion) to impel the decision made—if, indeed, the conclusion there reached does not rest in its entirety upon those conditions."

It is to be observed that the danger attendant to unloading materials from box cars is sufficiently dangerous that rules have been formulated by the American Railway Association as to how box cars may be safely unloaded. In this case, we have more negligence than existed in the Ponder case, plus the important fact that the act

of unloading *was not under the exclusive control of Kelley but that the danger that caused the accident had heretofore been created by Head.*

The case of *Motejl vs. Greenwood et al* by the Supreme Court of Oregon, 138 Pacific Reporter (2d) 216, also distinguishes the Anderson and Edwards' case from the facts in the case at bar. From Page 219 of the opinion, the Court says:

> "Defendants cite two cases involving the operation of unloading poles from a flat car. These cases are Southern Ry. Co. v. Edwards, 5 Cir. 44 F. (2d) 526, and Anderson v. Southern Ry. Co., 4 Cir., 20 F. (2d) 71. In these cases employees of the consignees were engaged in unloading the poles when the accidents occurred. There is nothing in the record of either case indicating that any part of the operation of unloading, or for that matter loading the poles, was performed or attempted by the carrier.
>
> In the Edwards case, the poles were loaded on a flat car by the shipper at a point on the line of the Mobile & Gulf Railroad. The car was received by the defendant carrier at a station on said defendant's line and transported to its destination.
>
> In the Anderson case, the car in question was shipped from Brunswick, Georgia, over another line of railroad, but was accepted by defendant and transported over defendant's line to Aiken, South Carolina. There it was placed on a side track for the purpose of being unloaded by the consignee. In the case at bar, the testimony is to the effect that usually the driver of the truck, an employee of defendant

Greenwood, removed the binder chain which obviously comprised part of the operation of unloading the logs.

(5, 6) To the point, that there is no obligation to warn of an obviously dangerous condition, a number of cases are cited. That rule is applicable to defendants as well as plaintiff's decedent. In the instant case, decedent would not have been injured if the binder chain had not been removed. Defendant Hansen had been told of the disarrangement of the logs. If the disarrangement of the logs was obvious, both the warning he had received and the obvious fact itself should have prevented him from removing the binder chain. In that state of the record, we are unable to concur with defendants in the suggestion that decedent was negligent in not telling Hansen not to remove the binder chain. In thus treating the matter, we are not unaware that Hansen said that decedent removed the binder chain, but the evidence on that point is conflicting and the trial court found that Hansen removed it. We are bound by the finding of the trial court. Decedent had a right to rely upon the assumption that Hansen would not be so recklessly unmindful of decedent's exposure to the direful result as to remove the binder chain."

We think the reasoning in the above case is excellent and Kelley had the right to rely upon the assumption that Head would not be so recklessly unmindful of Kelley's exposure to the direful result that followed as to remove a portion of the supports, thereby making it possible for the steel to fall upon Kelley.

This Honorable Court, in another opinion by Mr. Justice McCord in the recent case of *Phillips Petroleum Company vs. Hooper*, 164 F. (2d) 743, follows the Texas rule as to what constitutes contributory negligence in this language: "We further find no merit in defendant's contention that Hooper was guilty of contributory negligence as a matter of law. It was the duty of the defendant to furnish Hooper a reasonably safe station in which to enter and transact business. Hooper was not required upon each visit to inspect the premises for hazards or to anticipate that such premises were dangerous."

Citing McAfee v. Travis Gas Corp., 153 S. W. (2d) 442, *American Stores Co. v. Murray*, 87 F. (2d) 894, *Holmes v. Ginter Restaurant*, 54 F. (2d) 876. The McAfee case, as cited by Judge McCord, is a leading case in Texas on the question of contributory negligence. In that case the Court said:

> "We interpret the opinion of the Court of Civil Appeals to hold that because McAfee went to the place this pipe line was leaking, with full knowledge of the facts, and with full knowledge that such leaking pipe was an object of danger, he was guilty of contributory negligence as a matter of law. We are unable to agree to such a conclusion. The mere fact that a person may expose himself to a danger will not preclude a recovery. In order to preclude a recovery the danger must be such that a person of ordinary prudence under like circumstances would not subject himself to it. 28 C. J. 598. THE MERE FACT THAT

A PERSON MAY PARTICIPATE IN AN OPERATION ATTENDED BY SOME LATENT DANGER WILL NOT RENDER HIM GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. IT IS THE ESTABLISHED RULE IN THIS STATE THAT EVEN WHERE A PERSON HAS KNOWLEDGE, ACTUAL OR IMPUTED, OF A DEFECT, A QUESTION OF FACT AS TO NEGLIGENCE IS PRESENTED UNLESS IT CAN BE SAID, AS A MATTER OF LAW, THAT A PERSON OF ORDINARY CARE WOULD NOT HAVE INCURRED THE RISK .

"Gulf C. & S. F. Ry. Co. v. Gascamp, 69 Tex. 545, 7 S. W. 227; Gulf C. & S. F. Ry. Co. v. Irick, Tex. Civ. App., 116 S. W. (2d) 1099; 30 Tex. Jr. p. 764, sec. 96; Northcutt v. Magnolia Petroleum Co., Tex. Civ. App. 90 S. W. (2d) 632, writ refused

"In the Gascamp case, supra, the opinion is by Judge Gaines. The opinion discloses that the plaintiff was injured while crossing a bridge. The bridge was located upon a public road at a point where the road crossed the track of the railway company. It was the duty of the railway company to keep the bridge in repair. The bridge was in a bad state of repair and was dangerous to use. Plaintiff knew the dangerous condition of the bridge, but in spite of such knowledge attempted to cross it on horseback. A plank of the bridge, which was loose and rotten became displaced and frightened plaintiff's horse. This caused plaintiff to be thrown onto the railway track, thereby inflicting on him serious injury. Plaintiff was on his way to town, and the bridge was on the only road he could get there on. The railway

company contended that plaintiff was guilty of negligence, as a matter of law, in attempting to cross a bridge he knew was in a defective and dangerous condition. The jury acquitted the plaintiff of negligence. This Court, under the above facts, held that even though the plaintiff knew the bridge was in a dangerous condition, and that it was dangerous to cross it, still it was not negligence, as a matter of law, for him to risk such danger unless it could be further said that a person of ordinary prudence would not have incurred the risk. We quote the rule as announced in the opinion (69 Tex. 545, 7. S. W. 228):

"'* * * According to the rule in this Court, in order that an act shall be deemed negligent, per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence, that we can say, without hesitation or doubt, that no careful person would have commited it. * * *

"It is our opinion that the case at bar comes directly under the rule announced in the Gascamp case, supra. Certainly, if the operator of this gas pipe line had notice that it was leaking, under the facts above detailed, the jury was amply justified in finding negligence and proximate cause against it. Gas is a very dangerous substance. When a gas company has notice of a break in its pipe line, it must use due care and diligence to prevent the escape of gas therefrom. 21 Tex. Jr., pp. 11 to 15; McClure v. Hoopeston Gas & Elec. Co., 303 Ill. 89, 135 N. E. 43, 25 A. L. R. 250, See annotations 25 A. L. R. 262.

"Also under the facts detailed, the question as to the negligence of McAfee was a question for the jury.

> The mere fact that he knew about these leaks and knew that they constituted a dangerous condition would not, under the facts of this record, render his act of showing them to Joe Woods negligence as a matter of law."

While there are at least twenty Texas cases that we could discuss holding that the question of contributory negligence and proximate cause in cases where materials were negligently stacked and fell, were questions for the jury, we think it sufficient to cite the case of *Memphis Cotton Oil Co. v. Gardner*, 171 S.W. 1082, in which the Court said:

> "On December 24, 1912, he was ordered by Holland to stop the work of unloading and to go to work assisting the removing, retagging and loading certain sacks of meal from appellant's meal room into a car set for the purpose of being loaded; that some time prior thereto defendant, its foreman and employee, stacked a great number of sacks filled with cottonseed meal in its meal room in close proximity to the sacks which he was commanded to handle, and in doing so carelessly and negligently failed to tie or interlock said sacks in such manner as to insure the stacks standing against jars or shaking incidental to the running of the machinery therein; that the sacks weighed about 100 pounds each and were stacked one upon another to a great height, thereby rendering the same topheavy and liable to fall and dangerous to the life and limb of such employees of the company who were required to work in close proximity thereto; that the row of sacks nearest to where appellee

was about work were stacked with the ends towards his position, giving it the appearance of safety, and that he was ignorant of the true condition of the stack of sacks; that he was not informed of the danger attending the performance of the work to which he had been temporarily assigned; that the particular work he thus began to do was the lifting of sacks from the floor or from low stacks commencing but little above the place of the meal room and setting same at or near the door to retag, and which were taken away and loaded in the car by other hands. While thus engaged, and in a short time after beginning the work, and without knowledge on his part of danger and from causes unknown to him other than the negligent, careless, and insecure stacking above set out, a great number of sacks of meal fell from their high and insecure position and struck and bruised him, mashing him to the floor beneath their weight. It is alleged that the putting of the sacks in the stack, as above described, in the negligent manner in which they were placed was the direct and proximate cause of appellee's injuries and that defendant, its foreman and employees, did not stack the said sacks as a person of ordinary prudence would have done under the same circumstances, and as was their duty to do, all of which was known to defendant, its foreman and employees, and could have been known, by the use of ordinary care and diligence, at the time and before the injury, and that they were negligent in failing to warn plaintiff of the danger in which he had been so suddenly placed by order of the foreman. The appellant denied negligence in the particulars alleged, and alleged that the plaintiff voluntarily engaged in the work and was not working at said time

under the direction of defendant or any agent authorized or empowered to direct him to engage in such work; that his injuries were caused and due to his negligence being due to his own carelessness in removing and loading the sacks of meal whereby he incurred danger not necessarily incident to the work in which he was engaged; that the sacks were visible to him and all the dangers incident to said sacks stacked as they were at said time were openly visible to him and he really knew or could have known of the danger incident to the work by the use of ordinary care; and that he is thereby deprived of any right of recovery.

"The first assignment attacks the finding of the jury because the finding that defendant did not provide plaintiff a safe place in which to work is against the undisputed evidence, which is to the effect that there is no danger in the place in which plaintiff was at work, and the only danger to which plaintiff was exposed was caused by his own carelessness and his negligent manner in doing the work; that he was not engaged in tagging and retagging the sacks of meal, but was pulling down sacks in a negligent manner by pulling sacks from beneath instead of removing them from the top, which work he was doing voluntarily without instructions either as to doing or the manner in which he was to do the work from anyone, and with full knowledge of the danger to which he was exposing himself by the way he was removing said sacks of meal. Appellant submits this assignment as a proposition, and two other propositions are submitted thereunder: First, that plaintiff based his cause of action upon the negligence of defendant failing to stack the sacks in the meal room as an ordinarily prudent person would

have done and upon no other ground. It was incumbent upon the plaintiff to establish the same by a preponderance of the evidence, and, if he failed, the court should not have submitted the issue to the jury. And second, plaintiff could only recover upon the allegation of negligence alleged, and, if the evidence did not support same, it was error to submit a right of recovery upon any other ground, even if the evidence supported the other ground not alleged, and the court should have instructed a verdict for the defendant.

"The first issue submitted to the jury in effect is:

" 'Did the defendant company, its foreman and employees, fail to stack the sacks with a view of avoiding injury, as an ordinarily prudent person would have done?' "

"The jury answered this question in the affirmative. We are at a loss to understand what issue was here submitted that had no pleading to support it. The jury further found that the appellee was not guilty of contributory negligence, and further answered that the danger in handling the sacks was not open and visible, so that plaintiff could see, or know of it, or, from the nature of the work, would reasonably acquire knowledge of such danger; and further that he did not voluntarily assume the risk. They also found that P. M. Holland, the foreman of the mill, instructed him to move the sacks and to work in the place where the sacks were being moved. The testimony of appellee and that introduced by him is to the effect that P. M. Holland, the foreman and manager of the mill, who had the authority to employ and discharge, directed the appellee to assist

in tagging and retagging the sacks, and that, in obedience to such instruction, appellee left the work to which he had been assigned, and which he had theretofore been doing (that is, unloading cottonseed cake and carrying it into the mill or crusher to be ground into meal); that he went into the room where the meal was stacked to assist those engaged in tagging and retagging the sacks. In order to tag and retag the sacks, it was necessary to take the sacks from the stacks and place them so the old tags could be taken off and new ones put on, and, while he was removoing the sacks, a stack of the sacks fell on him, covering him up, injuring his ankle, etc. His evidence is that he did not know who had or how the stacks had been constructed previous to his going to work, and that no one warned him of the danger therefrom. He further testified that he thought he would be perfectly safe in getting the sacks, and if he had not so thought, he would not have gone in after the sacks. The evidence shows that sacks had been taken by others from the two tiers when appellee went into the room to work, and these two tiers extended about one--third the height of the stack at his side, or about six or seven high. It was out of these tiers that appellee commenced to remove the sacks, and he had been there but a short time when the stack fell over and caught him. He further states that the ends of the sacks next to those he was moving were towards him, and he did not think this tier would fall towards him, but that, if they fell, they would roll off to the side from him. From the evidence we do not find that he undermined the tiers of sacks next to the one he was removing, but only took off the tier which adjoined

the one that fell. Up to the time of the injury he was not aware of the manner in which the stack had been constructed.

"It appears from the evidence that the back tier of the stack, next to the stack with the ends towards appellee, the sacks therein for several tiers were piled one upon the other, without being tied or interlocked, and that these tiers pushed out the tier next to appellee and toppled it over on him. At least the jury were authorized to find that the failure to tie or interlock the rear sacks caused them, by reason of their weight, to force over the tier, the ends of which were next to appellee, and, if they had been tied, the sacks would not have so fallen, and that they were negligently stacked. It appears from the evidence that, after this accident, appellant caused stacks in the room to be tied or interlocked by persons then at work in that room. There is evidence to the effect that two weeks previous to the accident sacks so stacked had fallen in that room. There is evidence that in removing the sacks from the stack it was the rule at that mill, and the manager and foreman had so instructed the employees, to take the sacks down by tiers and leave the other tier with the straight wall of sacks. This, however, is denied, and there is evidence that the employees were instructed to commence removing the sacks from the top. As a matter of fact, every issuable fact in this case was controverted and the testimony thereon is conflicting. The evidence in this case tends to show that appellee had not been at work in removing sacks for tagging exceeding 30 minutes when the accident occurred, and he says that he had only removed seven or eight sacks and pulled the tags off ready for re-

tagging. The evidence shows that Holland, the superintendent, the day of the accident or the day after, told appellee that it was through appellant's carelessness that he was hurt, and that they would pay his doctor's bill, and for his time while confined, and that, if it had been his negligence, they would not do so. The evidence shows they did pay his doctor's bill, and for his time lost. We do not feel authorized, therefore, to say there was no fact which authorized the jury to find negligence, or in holding that the uncontroverted facts show that appellee was guilty of contributory negligence, and that he assumed the risk.

"As usual in cases of this character, there is a perfect wilderness of contradiction and conflicting testimony, but on that ground alone we do not feel justified in holding the verdict is without support. We do not think that it can be said, as a matter of law, that an inexperienced man, relying upon the assumption that the master knows his duty to the employees, and will perform it, would have known the manner of doing the work was not a reasonably safe one. We do not think within the 30 minutes' work that he acquired such knowledge as to apprise him of the danger he encountered in continuing the work. These questions, we think, were for the jury, and, having passed upon the facts, we do not believe we should disturb their findings. Bonnet v. Railway Co., 89 Tex. 72, 33 S. W. 334. There is evidence at least tending to support the findings of the jury. The same may be said as to contributory negligence. The appellee is not shown to have conducted himself out of the usual and ordinary way of performing the work, and the testimony is that the method of re-

ducing the pile of sacks was resorted to in the instant case that had theretofore been used and directed. True, some of the witnesses say it would have been better and safer to take the sacks from the top, but at least the question for the jury to say whether an ordinarily prudent man would have acted as did appellee under the circumstances."

In the case of *Herndon v. Halliburton Oil Well Cementing Co.*, 154 S.W. (2d) 163, a Texas case by an El Paso Court, in which writ was refused, the court laid down the proposition that in Texas a doctrine of assumed risks applies only to the relationship of master and servant.

The recent case of the *City of Beaumont v. Silas*, a Texas case in which writ was refused, the Court said: 200 S.W. (2d) 695—

"Questions of *contributory negligence* of the appellee and *assumption of risk by him presented questions of fact* for the jury which were properly submitted by the court in its charge, and such issues were determined by the jury in favor of the appellee. *If the sacks of cement in this case had been improperly and negligenlty stacked*, thereby rendering the warehouse an unsafe place in which appellee was to work, then the rule requiring the master to provide a reasonably safe place in which its servants were to work would make the appellant liable, even though the WPA, or some other agency or person, had actually done the stacking, if the elements of negligence and proximate cause were present. The duty to provide a reasonably safe place is unassignable and nondelegable by the master. Memphis Cotton

> Oil Co. v. Gardner, Tex. Civ. App., 171 S. W. 1082, and cases cited. In this case the city was found to be negligent in failing to have proper inspection of the cement stacks, in failing to warn appellee that the place was dangerous, in failing to require the cement to be stacked in a safe manner, and in failing to have proper supervision of the work appellee was immediately engaged in doing. We fail to see how the fact that the WPA had originally stacked the sacks of cement would relieve the city from its duty of providing a safe place for its workmen in the warehouse. If it was necessary to do so to make the warehouse safe, the city could have restacked the sacks of cement and could have had them stacked in the customarily safe manner. These issues were properly submitted by the court in its issues in regard to negligence and proximate cause."

The Supreme Court of Texas in the very recent case of the *Texas & Pacific Ry. Co. v. Day*, 197 S.W. (2d) 332, laid down the rule as follows: Mr. Justice Simpson said—

> "Contributory negligence barring a recovery as a matter of law is a conclusion sometimes compelled by the evidence, but such cases are relatively rare. Ordinarily this question is for the trier of facts and only becomes a matter of law for the court when but one reasonable conclusion can be drawn from all the testimony. City of Fort Worth v. Lee, 143 Tex. 551, 186 S. W. 2d. 954, 159, A. L. R."

It is obvious that had Day been more cautious, he would not have been injured. But whether the precautions he took amounted to due care was properly left to the jury.

In this case, Kelley was removing only one stave of steel at a time. He had prepared his own lights and had requested more light and shortly after making such request, he was injured. Of course, the real proximate cause was the support having been loosened to such an extent by Head that it broke, causing the stave to fall, but the facts show that Kelley did exercise some care for his own safety and whether or not an ordinarily prudent man would have incurred this risk was, under the above decisions, a question for the jury. Under the Day case and others in Texas, it is only in a case where no care is exercised that one is guilty of contributory negligence as a matter of law.

The recent Texas Supreme Court case of *Shuford v. City of Dallas*, 190 S. W. 2d 721, the Supreme Court held that whether a pedestrian *who proceeded in the dark* and fell over an unguarded and unlighted pile of dirt in front of her home was contributorily negligent was a question for the jury, notwithstanding the pedestrian's *knowledge that the street was in the process of repairs.* The court held, in part, as follows:

> "We agree with the minority statement of the law that "even knowledge by the traveler of a street or sidewalk obstruction is not conclusive of negligence," and that the question of contributory negligence raised by the evidence is one for the jury under the circumstances of the particular case. The cases and authorities cited in the minority opinon support the principle stated. We adopt as correct the following

excerpt therefrom: "Texas courts uniformly hold that even knowledge by the traveler of a street or sidewalk obstruction is not conclusive of negligence. The question of contributory negligence thus raised is one for the jury under circumstances of the particular case. Gulf C. & S. F. R. Co. v. Gascamp, 69 Tex. 545, 7 S. W. 227; City of Denison v. Sanford, 2 Tex. Civ. App. 661, 21 S. W. 784; Butler v. City of Conroe, Tex. Civ. App. 218 S. W. 557. Use of a highway, though known to be dangerous is not negligence per se. Marshall & E. T. R. Co. v. Petty, 107 Tex. 387, 180 S. W. 105, L. R. A. 1918A, 192. Note also 39 T. J., Streets, Sec. 128, pp. 703, 704, and footnote of cases holding: 'But the fact that a person knows or might have known that a street or sidewalk was defective or in a dangerous condition does not necessarily impose upon him the duty of refraining from traveling thereon, or charge him as a matter of law with contributory negligence in using the way—even at night; * * * Nor does the mere fact that a pedestrian temporarily forgets an obstruction across a sidewalk convict him of contributory negligence as a matter of law,' And quoting from 43 C. J., p. 1082: 'The mere fact that one using a street or public way had knowledge of the defect or obstruction by reason of which he was injured does not, as a matter of law, constitute contributory negligence precluding a recovery, if in view of such knowledge he exercised reasonable and ordinary care under the circumstances.' (P. 1086) 'A traveler is not precluded from recovery because he knew of the defect or obstruction, where his knowledge was remote, or imperfect, or insufficient to give a full appreciation of the danger, as where he knew of the generally defective condition of the way, but had no knowledge of the particular defect which cause the injury'."

CONCLUSION AND PRAYER

The above cases fully demonstrate that the dissenting opinion of Mr. Justice Holmes is correct and that the decision and judgment of the Honorable Trial Court, to-wit, the Honorable R. E. Thomason, District Judge for the United States District Court in and for the Western District of Texas, was also eminently correct and that this Honorable Court should review this cause by granting a Writ of Certiorari and by reversing the said decision and affirming the judgment of the Honorable Trial Court.

Respectfully submitted,

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A copy of the Petition for Writ of Certiorari and brief in support thereof has been furnished the Hon. Chas. C. Crenshaw, of Lubbock, Texas, Attorney for Respondent.

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